

In the matter of the notice of proposed rulemaking FCC 02-230, the FCC should reject the proposal as unacceptable as a whole for the following reasons:

- 1) The rulemaking is based on faulty premises.
- 2) The rulemaking does not solve the problem it is intended to address.
- 3) The rulemaking unfairly infringes upon the fair use rights of consumers under copyright law.
- 4) The rulemaking unfairly represents the views of a minority of stakeholders.
- 5) The rulemaking unfairly externalizes the costs of protecting intellectual property.

Originators of intellectual property have a valid interest in exercising their rights to protect the fruits of their labor and it is in the interest of everyone to find a compromise that balances the rights of content producers and consumers. However, the proposed rulemaking satisfies neither the legitimate need of intellectual property holders to protect their content nor does it protect the rights of the consumer to engage in fair use of that content. The proposal is flawed and should be rejected for the following reasons:

- 1) The rulemaking is based on faulty premises.

The premises under which the rulemaking was authored are faulty and results in a subsequently flawed rulemaking. The faulty premises advanced to support this rulemaking and the arguments refuting these premises are as follows:

- a) Premise: Content released in digital media are more Susceptible to piracy than content released in analog media because digital copies can be made with no loss of quality.

Content released in digital media are no more susceptible to piracy than content released in analog media. Any analog content can be transferred to a digital media and thereafter retransmitted with no loss of quality. The rate of technological advance assures that any imperfections in the transfer process from an analog master to a digital copy will continue to fade. Thus, any attempt to discriminate between analog and digital transmission or media when considering the implications of piracy is nothing more than an attempt to secure a government sanctioned monopoly for digital technologies that is non-existent for analog technologies.

Further, the issue of quality as a motivator to encourage piracy of content is seriously called into question by the actual behavior of consumers in the music market. The most popular format for exchanging digital copies of music files, legitimately or not, is the MP3 format. This format is a "lossy" format meaning that information about the music is dropped selectively to reduce the size of the resulting

file. Any copy of piece of content that is stored in MP3 format is by definition inferior to the original copy, often times noticeably so. Despite the fact that these copies are inferior to the original, music industry representatives continue to claim that these imperfect copies are having a significant impact on the sales of content. Quality, then, does not appear to be a significant factor in piracy of music and there is no reason to assume that consumer behavior will change with respect to video media.

- b) Premise: Content providers will not provide content in the absence of this rulemaking or regulation or legislation that is substantially similar.

This assertion is false on its face. The technology required to make illegal copies of content already exists and is easy to acquire, both in digital and analog form. Despite the fact that piracy of content is trivial, content providers have not changed either the channels of distribution or the frequency of distribution of their content. As examples:

Content providers continue to provide broadcast programming despite the fact that piracy of that content is entirely possible. Content providers will argue that the content being broadcast is analog and of lower quality and is therefore undesirable for piracy. As demonstrated above ( See: 1a ), neither of these conditions is an inhibitor to piracy. New programming continues to appear on broadcast television despite the lack of any effective controls on the content.

The encryption system for Digital Versatile Disks (DVDs) has proven trivial to circumvent and the tools for consumers to make copies of the digital content contained therein are easily available. Thus, any content distributed on DVD media is an easy and obvious target for piracy. Again, even in the absence of any effective protection for their content, DVDs continue to be offered for sale.

Intellectual property owners' arguments that they will be unwilling to provide content in the absence of this regulation is inconsistent with their own behavior.

- 2) The rulemaking does not solve the problem it is intended to address.

In the age of the Internet it is unrealistic to believe that this regulation will negatively impact the rate of piracy of intellectual property. The United States is not isolated from the rest of the world and a single illegal copy of a piece of content that is subsequently posted to the Internet effectively knocks down the house of cards that this regulation is constructing. Pirates will continue to operate with the same ease as before this regulation but law abiding citizens, now presumed guilty until proven innocent, will be forced to pay to support this farce.

- 3) The rulemaking unfairly infringes upon the fair use rights of consumers under copyright law.

The purpose of intellectual property law is to balance the rights of the intellectual property creator and the benefit to the public. This rulemaking undermines legitimate non-infringing uses of copyright protected content, such as time shifting, while granting new and substantial power to intellectual property holders without an offsetting benefit to the public.

- 4) The rulemaking unfairly represents the views of a minority of stakeholders.

In the recommendations of the Broadcast Protection Discussion Subgroup implemented in this proposed rulemaking one significant stakeholder is conspicuously absent: the consumer. Ultimately it is the consumer who will have to pay for and live with this rulemaking.

- 5) The rulemaking unfairly externalizes the costs of protecting intellectual property.

Under the laws of the United States intellectual property holders are already provided remedies to discourage and prosecute those who abuse the holders' property rights. In this rulemaking IP holders are asking for additional protections above and beyond those provided for by law and are asking that the costs of that additional protection are carried by the entire populace of consumer electronics purchasers. The costs of this additional protection should instead be carried by those that derive the benefit of the protection, namely the IP holders and the consumers of their content.